

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>91-12081</u>
BILLY SMITH)	
RAPHAELLA A. SMITH)	
)	
Debtors)	
_____)	
JAMES D. WALKER, JR.,)	FILED
CHAPTER 7 TRUSTEE)	at 4 O'clock & 21 min. P.M.
)	Date: 7-20-93
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>92-1078</u>
BILLY SMITH)	
)	
First Defendant)	
)	
ATLANTIC MERCANTILE COLLECTION)	
BUREAU, INC.)	
)	
Second Defendant)	

ORDER

James D. Walker, Jr., the Chapter 7 trustee in the underlying case, moves for summary judgment on his complaint pursuant to Federal Rule of Civil Procedure (FRCP) 56. For the reasons below, summary judgment for the trustee is inappropriate. As it appears undisputed facts warrant judgment for defendants as a matter of law, the trustee will be given an opportunity to show cause why summary judgment does not lie in favor of the defendants.

From the pleadings, exhibits, affidavits, and other evidence of record, the following facts are not in dispute. Billy

Smith, one of the debtors in the underlying case, formerly was sole shareholder of Allied Collection Services, Inc. (Allied). On February 2, 1988 Billy Smith and Atlantic Mercantile Collection Bureau, Inc. (Atlantic) executed a "Purchase and Sale Agreement" whereby Smith sold Allied to Atlantic. Of relevance here, the purchase and sale agreement provides:

7. Consideration to Smith.

Purchaser [Atlantic] shall pay to [Billy] Smith the following:

. . .

3. . . . a retirement benefit in consideration for his services to purchaser. This retirement benefit shall be in the amount of \$108,000. and shall be paid as provided for in paragraph 8(d)

Paragraph 8(d) states:

On the 1st day of the 37th month following Closing, purchaser shall pay to Smith the sum of \$2,000. Monthly payments of \$2,000. shall be continued to Smith for and during the term of his life. This payment shall represent a retirement benefit to Smith and shall in no event be less than a total of \$108,000.¹

On November 5, 1991 Billy Smith and Raphaella A. Smith, his wife, filed a joint Chapter 7 petition. Debtors claimed all of the retirement payments as exempt property. See Schedule C.² This

¹The payments to Billy Smith required under paragraphs 7 and 8(d) of the purchase and sale agreement are referenced hereinafter as "the retirement payments."

²Schedule C describes the exempt property as "[r]etirement and disability benefits of H[usband] [and] W[ife] from: . . . (c) Mid-Atlantic Management Corp.," and claims as exempt "100% of all payments." Although in their pleadings the debtors deny knowledge of the relationship between the entities Atlantic Mercantile Collection Bureau, Inc. and Mid-Atlantic Management Corporation, the parties otherwise do not dispute that the debtors intended to and claimed as exempt the \$2,000.00 per month payments provided for in paragraph 8(d) of the purchase and sale agreement with Atlantic

court's "Order and Notice of Chapter 7 Bankruptcy Filing, Meeting of Creditors, and Fixing of Dates," dated November 7, 1991, states in pertinent part: "An objection [to an exemption claimed by the debtor(s)] must be filed no later than thirty (30) days after the conclusion of the meeting of creditors." On December 16, 1991 the trustee conducted and concluded the meeting of creditors required by 11 U.S.C. §341.

Prior to filing this complaint on December 1, 1992, the trustee did not object to the exemption claimed by debtors for the retirement payments. No party in interest in this case timely objected to the exemption. In the complaint the trustee alleges the retirement payments are not exemptible under applicable law, see 11 U.S.C. §522(b) and constitute property of debtors' bankruptcy estate under 11 U.S.C. §541(a). The trustee contends the retirement payments made to Billy Smith to date may be recovered from the debtors and that future retirement payments may be recovered from defendant Atlantic. The trustee filed this motion for summary judgment on April 16, 1993.

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56, made applicable by Federal Rule of Bankruptcy Procedure (FRBP) 7056. "[A] party moving for summary judgment bears the initial burden of showing by

Mercantile Collection Bureau, Inc. See Complaint, para. No.s 5, 6 and Answer, para. No.s 4, 5.

reference to the record, that there is not a genuine issue of material fact." Velten v. Regis B. Lippert, Intercat, Inc., 985 F.2d 1515, 1523 (11th Cir. 1993). See also Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "If this showing is made, the burden shifts to the nonmoving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). "When a motion for summary judgment is made and supported as provided in this rule [FRCP 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FRCP 56(e). The evidence is reviewed "in a light most favorable to the opponent of the motion. All reasonable doubts and inferences should be resolved in favor of the opponent." Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1506 (11th Cir. 1985) (citation omitted), cert. denied, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986).³

In his supporting brief, the trustee argues that the

³ Neither defendant has responded to the trustee's motion, or filed a cross-motion for summary judgment. Local Rule 6.2 provides that "[f]ailure to respond shall indicate there is no opposition to a motion [for summary judgment]." Nevertheless, the trial court may not automatically grant summary judgment based on a nonmoving party's failure to respond. Dixie Stevedores, Inc. v. Marine Maritime, Ltd., 778 F.2d 670, 673 (11th Cir. 1985); see also John v. State of Louisiana, 757 F.2d 698, 710 (5th Cir. 1985). The movant must meet the initial burden of showing there is no dispute as to any material fact, and, based on the undisputed facts, that the movant is entitled to a judgment as a matter of law.

retirement payments are not exemptible. The trustee alleges he agreed with debtors' counsel at the first meeting of creditors that "it would not be necessary for the Trustee to object to such claim of exemptions until [the trustee and debtors' attorney] either resolved the problem or the Debtors' attorney requested the matter be resolved by the Court." Trustee's brief, p. 3. In support of this alleged agreement, the trustee attached to his brief copies of correspondence between counsel purportedly evidencing the agreement and tendered a cassette recording of the meeting of creditors as further proof.

The trustee's legal contentions regarding the exemptibility of the retirement payments are not addressed in this order because the trustee's failure to timely object to the debtors' claimed exemption of the retirement payments appears dispositive of the complaint. The Bankruptcy Code provides that "[t]he debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section [522]. . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt." 11 U.S.C. §522(l). FRBP 4003(b) provides that

[t]he trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list of supplemental schedules unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.

(Emphasis added). In addition to FRBP 4003(b), this court's notice reminded the trustee of the bar date for filing objections to

claimed exemptions.

The United States Supreme Court recently held that under 11 U.S.C. §522(l) and FRBP 4003(b), a trustee's failure to timely object to claimed exemptions bars a challenge to the validity of the exemptions by the trustee, even if an otherwise valid objection existed. Taylor v. Freeland and Kronz, ____ U.S. ____, 112 S.Ct. 1644, 118 L.E.2d 280 (1992). Moreover, that the trustee and debtors' attorney agreed to extend indefinitely the deadline for objecting, assuming they did, is irrelevant. "The parties are not free to extend by private agreement a bar date established by law or court order." In re: Dent, 137 B.R. 78, 80 (Bankr. S.D. Ga. 1992). Neither §522(l) or FRBP 4003(b) provides an exception to the 30-day deadline based on a private agreement between the parties; nor did the Supreme Court in Taylor. If the trustee needed additional time to determine the exemption's validity, he could have requested a hearing, FRBP 4003(c), or sought additional time to file an objection. FRBP 4003(b); see Taylor, supra, 112 S.Ct. at 1648. "Having done neither, [the trustee] cannot now seek to deprive [debtors] of the exemption." Taylor, supra, at 1648. As no party in interest timely objected to debtors' claimed exemption of the retirement payments, the retirement payments are exempt property. 11 U.S.C. §522(l). As a matter of law, the trustee cannot recover exempt property. 11 U.S.C. §542(a). Thus, the defendants appear entitled to judgment as a matter of law. However, neither defendant moved for summary judgment.

Summary judgment may be granted sua sponte to the nonmoving party. Lindsey v. U.S. Bureau of Prisons, U.S. Dept. of

Justice, 736 F.2d 1462, 1463 (11th Cir. 1984), vacated on other grounds and remanded, 469 U.S. 1082, 105 S.Ct. 584, 83 L.Ed.2d 695 (1984). See generally Coach Leatherwear Co., Inc. v. AnnTaylor, Inc., 933 F.2d 162, 167 (2nd Cir. 1991); Matter of Caravan Refrigerated Cargo, Inc., 864 F.2d 388, 393 (5th Cir. 1989); National Expositions, Inc. v. Crowley Maritime Corp., 824 F.2d 131, 133 (1st Cir. 1987). "To conclude otherwise would result in unnecessary trials and would be inconsistent with the objective of Rule 56 of expediting the disposition of cases." 10A Charles Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure, §2720 p. 28 (West 1983) (footnote omitted). "Nevertheless, before summary judgment can be entered for the non-moving party the court must give the original movant an opportunity to demonstrate that his opponent is not entitled to judgment as a matter of law." Lindsey, supra, at 1463. See generally Wright, supra, at 27-35. Based on his failure to timely object to the exemption, the trustee's legal arguments that the retirement payments are not exemptible are moot and his motion must be denied. Because neither defendant has moved for summary judgment, the trustee must be given an opportunity to show why defendants are not entitled to judgment as a matter of law.

It is therefore ORDERED that the trustee's motion for summary judgment is denied; absent a showing of cause for a hearing, the trustee is hereby given thirty (30) days from the date of this order to show by letter brief why, in light of the United States Supreme Court's decision in Taylor v. Freeland and Kronz, __ U.S. ___, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992), the defendants are not entitled to judgment on the trustee's complaint as a matter

of law; the defendants will be given fifteen (15) days from the date of the trustee's letter brief to respond in like fashion; barring this showing by the trustee, summary judgment will be forthwith entered for both defendants.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 20th day of July, 1993.